No. 77-1785

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

KERR-McGEE CHEMICAL CORPORATION,
Petitioner,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,
Respondents.

BRIEF OF RESPONDENT STATE OF FLORIDA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

Respondent State of Florida disagrees with Petitioner's statement of the questions presented because it presupposes that once "valuable deposits" are certified that the Secretary of the Interior must issue a lease; therefore, the following questions are presented:

1. Does the Secretary of the Interior retain discretion under the Mineral Leasing Act to deny the issuance of a preference right phosphate lease in spite of a finding of "valuable deposits," when the issuance of such lease would not be in the public interest?

2. Must the Secretary of Agriculture give his approval prior to the issuance of preference right phosphate leases?

3. Does the Endangered Species Act of 1973 prohibit phosphate strip mining in the Osceola National Forest?

4. Does the National Environmental Policy Act give the Secretary of the Interior discretionary authority to refuse to grant preference right phosphate leases?

STATUTE INVOLVED

Section 9 of the Mineral Leasing Act of 1920, 41 Stat. 437 as it appears in 30 U.S.C. §211, provides in pertinent part (Petitioner quoted only (b), apparently suggesting that (a) was not pertinent):

> (a) The Secretary of the Interior is authorized to lease to any applicant qualified under this chapter, through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, any phosphate deposits of the United States, and lands containing such deposits, including associated and related minerals, when in his judgment the public interest will be best served thereby.

> The lands shall be leased under such terms and conditions as are herein specified, in units reasonably compact in form of not to exceed two thousand five hundred and sixty acres.
>
> (b) Where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area, the Secretary of the Interior is authorized to issue, to any applicant qualified under this chapter, a prospecting permit which shall give the exclusive right to prospect for phosphate deposits, including associated minerals, for a period of two years, for not more than two thousand five hundred and sixty acres; and if prior to the expiration of the permit the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit.

STATEMENT OF THE CASE

Kerr-McGee Chemical Corporation filed suit on April 13, 1976, seeking to enjoin the Secretary of the Interior from refusing to grant preference leases, and to declare that 30 U.S.C. §211(a) & (b) required that the Secretary issue the leases when the United States Geological Survey certifies the discovery of "valuable deposits" of phosphate.

The State of Florida, which had earlier filed suit against the Secretary of the Interior to enjoin him from issuing the leases, was allowed to intervene. This earlier suit by the State of Florida resulted in the preparation of an environmental impact statement pursuant to the provisions of NEPA. The State of Florida urged in the District Court and Circuit Court of Appeals an interpretation of 30 U.S.C. §211(a) & (b) that would require the Secretary to issue leases only when he finds that it is in the "public interest."

The District Court declared that 30 U.S.C. §211 required the issuance of preference right mining lease when a permittee made a discovery of a valuable mineral deposit on land embraced in a valid permit, and that since Kerr-McGee had made such a discovery, preference right leases must issue.

On appeal, the Secretary asserted that Kerr-McGee had not complied with the new federal regulations for the certification of valuable deposits. The appeal of the State of Florida, which was consolidated with the Secretary's appeal, asserted several positions: (1) that 30 U.S.C. §211 requires the Secretary to issue a preference right lease only when it is in the public interest, (2) that the Endangered Species Act of 1973 prohibits phosphate mining in the Osceola National Forest, (3) that the Secretary of Agriculture must approve the leases before their issuance, and (4) that the Secretary could withdraw the lands from availability for mining.

The Circuit Court of Appeals for the District of Columbia summarily reversed the District Court and ordered the case dismissed for failure of Kerr-McGee to exhaust administrative remedies.

ARGUMENT

Petitioner Kerr-McGee has offered this Court no cogent legal arguments for this Court to review the decision of the Circuit Court of Appeals for the District of Columbia in this case. The Secretary of the Interior has not made a final decision whether to issue the preference leases. If the Secretary decides to issue the

leases, then the action of this Court, and of the attorneys in presenting their respective positions, would be in vain. If the Secretary does not issue the leases, the reasons for his decision will be necessary for judicial review. In either case, judicial intervention at this particular point, as the Circuit Court of Appeals has ruled, is premature.

Although the narrow ruling is sufficient to deny review in this case, Respondent would show the presence of other meritorious arguments which would result in a remand and dismissal of the District Court's decision.

In determining whether a prospecting permittee has the right to a lease if "valuable deposits" are discovered, paragraphs (a) and (b) of 30 U.S.C. §211 must be considered together, and interpreted so as to create harmony. Weinberger v. Hynson, Westiott & Dunning, 412 U.S. 609 (1973). Section 211(a) is a general grant of authority to the Secretary to issue leases to mine federal phosphate deposits "when in his judgment the public interest will be best served thereby." It provides

that the leasing be accomplished by specific means and "such other methods" as may be adopted. Section 211(b) describes such another method--the issuance of prospecting permits and preference right leases. This latter section only grants the prospecting permittee who has discovered "valuable deposits" a preference or priority in the issuance of a lease if the Secretary determines that the public interest will best be served.

The congressional history of Section 211(b) supports this interpretation. Senate Bill S.2061, which added (b) states its purpose as follows:

> If enacted, S.2061, as amended, would correct the situation [of a permittee who discovers phosphate having no advantage in bidding for a lease] since a permittee would have a preference right to a lease. . . . (e.s.) Senate Report No. 879 (1960 U.S. Code Cong. & Adm. News, 1805).

Since the purpose was to correct the situation of an applicant for a lease who performed prospecting work to have to outbid his rivals, it is clear that (b) creates a right to a lease as against rival applicants, but not an absolute right to a

lease. If Congress had intended that the right be absolute it would not have spoken of it as a preference right.

The fact that the interpretation placed on the statute by the Secretary of the Interior is contrary to that asserted by the State of Florida is not controlling, since no agency expertise was necessary in such interpretation and construction of statutes is ultimately a judicial responsibility.

In addition, 30 U.S.C §211 should be construed in accordance with the policies set forth in the National Environmental Policy Act [NEPA]. There can be little doubt that issuance of leases to strip mine a substantial portion of a national forest is "major federal action." See Texas Committee on Natural Resources v. Bergland, ___ F.2d ___, 11 ERC 1673, 5th Cir.1978. The statutory conflict provision of NEPA has been applied sparingly. The conflict between the agency's organic statute and NEPA must be both fundamental and irreconcilable. Flint Ridge Development Co. v. Scenic Rivers Association, 426 U.S. 776, reh. denied, 429 U.S. 785 (1975). Such a fundamental and irreconcilable conflict does not exist in the instant case, and the Secretary should be required to consider the adverse environmental effects

of his action before deciding whether or not to issue the leases.

The Secretary of the Interior posseses broad inherent discretion in protecting the environment. In Gulf Oil v. Morton, 493 F.2d 141 (9th Cir.1973), the court upheld the Secretary's decision to suspend offshore drilling operations based upon his determination that continued drilling would pose an unacceptable risk to the marine environment. The court held that NEPA removed all doubts regarding the Secretary's broad powers in protecting the environment. Any doubt as to the interpretation of §211 was removed when Congress enacted NEPA.

The Mineral Leasing Act also provides that mineral deposits shall not be leased except with the consent of the head of the department having jurisdiction over the lands containing the deposit. 30 U.S.C. §352. There has been no evidence ever presented indicating that the Secretary of Agriculture has ever reviewed Kerr-McGee's lease applications.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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